MALAYSIAN REPORTS

HAJI MOHAMED BIN SUBOH v. DEVADAS

[F.C. (Lee Hun Hoe C.J. (Borneo), Wan Suleiman F.J. & Abdul Hamid J.) February 2 & October 12, 1980]

[Johore Bahru — Federal Court Civil Appeal No. 164 of 1978]

Practice and Procedure — Memorandum of Appeal — Application for extension of time to serve memorandum of appeal on respondent — Application rejected by judge — Discretion — R.S.C. 1957, O. 59 r. 4(3).

In this case the appellant had applied for extension of time to serve the memorandum of appeal on the respondent. Counsel for the appellant in an affidavit gave the reasons for the delay but the learned judge held that the affidavit showed no sufficient grounds for the delay. The appellant appealed.

Held: the matter was one for the judicial discretion of the learned judge and in this case the learned judge was correct in holding that no sufficient ground had been advanced for the delay as to incline him to exercise his discretion in favour of the appellant.

Cases referred to:-

(1) *Re Coles & Ravenshear* [1907] 1 K.B. 1.

(2) *Gatti* v. *Shoosmith* [1939] 3 All E.R. 916.

(3) *Chong Kueng Ying & Ors.* v. *Lovis Lavagna* [1972] 1 M.L.J. 180.

(4) *Chin Hua Sawmill Co. Sdn. Bhd.* v. *Tuan Yusoff bin Tuan Mohamed* [1974] 1 M.L.J. 58.

(5) *Veerasingam* v. *Public Prosecutor* [1958] M.L.J. 76, 79.

HIGH COURT.

D.A. Devadason for the appellant.

N. Ramachandran for the respondent.

Thara Singh Sidhu for substituted defendant, Haji Alwi bin Abdullah.

Cur. Adv. Vult.

Ajaib Singh J.: This was an application for an extension of time to serve the memorandum of appeal on the respondent in an appeal from the decision of the Sessions Court. The facts leading to the application were as follows. On January 24, 1978 the appellant filed a civil action against the respondent for the return of a deposit of $5,000 which the appellant had paid to the respondent on May 12, 1977 for the purchase of a piece of land. The appellant alleged that a month after he had paid the deposit he came to know that the land in question was not for sale and that the broker Haji Alwi bin Abdullah was a fraud. The appellant made several requests for the refund of the $5,000 but the respondent had refused to return the deposit. The appellant claimed the return of the deposit with interest and costs of the proceedings.

The respondent who is an advocate and solicitor sought relief by way of interpleader and to that end he filed an application on interpleader on February 25, 1978. He prayed that he be at liberty to pay the sum of $5,000 into court and that the costs of the interpleader proceedings be assessed and paid out of this sum and that he may thereupon be dismissed from the proceedings. In his affidavit in support the respondent said that he had received from Haji Alwi bin Abdullah claims adverse to that of the appellant in respect of the same subject-matter. He said that he had no interest in the subject-matter in dispute otherwise than for costs or charges and he said that he did not collude with either of the claimants. The application on interpleader was served on the appellant as well as on Haji Alwi bin Abdullah.

Haji Alwi bin Abdullah also filed an affidavit through his solicitors Goh Soot Hwang & Co. wherein he said that on January 26, 1977 he paid a deposit to the agent of the owner of the land in question and he was given the title-deed thereof which he now had in his possession. On the same day he entered into an agreement for the sale of the land to the appellant at a price of $9,100. The appellant paid a sum of $4,100 to him and another sum of $5,000 by way of deposit to the respondent who was his previous solicitor towards the total purchase price of $9,100. He said that there was no time-limit for the completion of the sale of the land and it was agreed that when the land was transferred to him he would retransfer it to the appellant. He had now instructed his present solicitors to bring an action against the agent and the owner of the land for an order that the land be transferred to the appellant. He said further that the appellant had instituted proceedings against him in the High Court for the return of the $4,100 which the appellant had paid him. He had filed a defence to the claim and the suit was now pending trial. He also said that he had instructed his previous solicitor Mr. P. Devadas not to return the $5,000 to the appellant as he was not in breach of the agreement which he had entered into with the appellant. On November 26, 1977 this sum of $5,000 was however paid to Andrew T.S. Goh & Co. the former solicitors of the appellant to be held by them as stakeholders. On December 30, 1977 the solicitors returned the sum of $5,000 to Messrs. P. Devadas & Co. Haji Alwi bin Abdullah alleged further in his affidavit that he was entitled to the sum of $5,000 as it was paid in pursuance of the agreement dated January 26, 1977 entered between himself and the appellant.

A further affidavit was filed by the respondent which more or less corroborated the contents of the affidavit of Haji Alwi bin Abdullah. The interpleader proceedings were heard by the President of the Sessions Court and it was ordered that the respondent be struck out as a party in the civil action brought in by the appellant subject to the respondent paying into court the sum of $5,000 within three days. Haji Alwi bin Abdullah was ordered to be substituted as the defendant in the civil action. This order was made on March 27, 1978 but it was varied on April 7, 1978 to the effect that the appellant was to amend the names of the parties in the civil action and that the substituted defendant was to file his defence within fourteen days.

A notice of appeal against this decision was filed in the Sessions Court on April 7, 1978 and upon receiving the grounds of judgment dated April 28, 1978 the appellant filed a memorandum of appeal in the High Court on May 10, 1978. On May 17, 1978 the Registrar of the Sessions Court served on the appellant a notice in Form 40 under Order XXXIX rule 3(2) of the Subordinate Courts Rules intimating to the appellant that the appeal record was ready. Under Order 59 rule 2(1) of the Rules of the Supreme Court the appellant was thereafter required to file in the

High Court in duplicate a memorandum of appeal within fourteen days from the date of service on him of the notice in Form 40 and under rule 2(2) of Order 59 the appellant also had to serve copies of the memorandum of appeal and of the appeal record on the respondent within the same period of fourteen days. The last day for the filing of the memorandum of appeal in the High Court and for the service of the memorandum and the appeal record on the respondent was May 31, 1978. The respondent however was not served with the memorandum of appeal and the appeal record until June 19, 1978. The substituted defendant Haji Alwi bin Abdullah was not served with the notice of appeal. The appellant's counsel Mr. D.A. Devadason contended strongly that there was no necessity for the notice of appeal to be served on the substituted defendant because he was in no way affected by the appeal.

The application for extension of time was made by the appellant by notice of motion which was supported by the affidavit of his counsel Mr. D.A. Devadason. In his affidavit Mr. Devadason stated that he received Form 40 from the Registrar of the Sessions Court on May 17, 1978 wherein a request to pay a sum of $48.50 was made. This sum was paid to the Registrar on the same day. On May 18, 1978 he returned the appeal record to the Registrar because the appellant's bundle of documents dated April 4, 1978 had not been included in the appeal record. On June 12, 1978 the appeal record was completed whereupon a further sum of $29 was paid to the Registrar and on June 17, 1978 a copy of the memorandum of appeal and appeal record were posted to the respondent and these were received by the respondent on June 19, 1978. Mr. Devadason stated further in his affidavit that the appellant had a good chance of succeeding in the appeal on the merits of the case. He said that as the appeal record was ready only on June 12, 1978 the date on Form 40 should read June 12, 1978 and not May 17, 1978. He said that in the peculiar circumstances of the case an extension of time should be granted in terms of the notice of motion.

It has been stressed time and again that the rules of procedure must be strictly complied with by all litigants who seek remedy of any kind in a court of law. Any litigant who disregards the rules of procedure does so at his peril and he cannot thereafter be heard to say that he has been denied justice in a cause or matter which might otherwise have been favourable to him but for the failure on his part to follow the rules for in such a case he has none but himself to blame for the predicament in which he may find himself. I am of course not unmindful of the oft-quoted dictum of Lord Collins M.R. in *Re Coles and Ravenshear*[1] which is aptly reproduced at the beginning of *Mallal's* Supreme Court Practice as follows: —

"Although a court cannot conduct its business without a code of procedure, the relation of the rules of practice to the work of justice is intended to be that of handmaid rather than mistress; and the court ought not to be so far bound and tied by rules, which are after all only intended as general rules of procedure, as to be compelled to do what will cause injustice in the particular case."

The observations of Lord Collins are certainly not meant to excuse recalcitrant litigants who have scant respect for the rules of procedure. The rules are there to be followed and they may be relaxed in the interest of justice only if sufficient cause is shown. To what extent will non-compliance with any rule of procedure affect the proceedings must depend on the kind of rule involved. I can think of four categories of the rules. First the rules which are minor or technical. Non-compliance with such rules will not vitiate the proceedings. For example failure to give notice of intention to use any affidavit under Order 38 rule 20 of the Rules of the Supreme Court may well be considered as a mere irregularity not rendering the proceedings void. In the second category are those rules which prescribe periods of time within which to file and deliver pleadings or other documents in civil proceedings. Extension of time is generally granted in such a case on terms if the granting of the extension does not put the other party to the proceedings at any disadvantage. The third category of rules are those which must be strictly complied with before a person can obtain any relief in court. Order 14 is a good example of this category of rules. The affidavit in support of an application for summary judgment must fulfil strictly the conditions set out in rule 1(a) of Order 14. If the affidavit is deficient for want of compliance with this rule the application for summary judgment will be dismissed unless the position is rectified by a supplementary affidavit. Lastly there are the rules which relate to civil appeals from the decisions of the lower courts. These rules prescribe the time within which to file a notice of appeal and the memorandum of appeal and the service thereof and of the appeal record on the respondent to the appeal. These rules must be complied with. In the interest of justice however the court may extend time but only if sufficient ground is shown for the delay. What amounts to sufficient ground will depend on the facts and circumstances of the particular case.

In respect of appeals from the High Court to the Federal Court a mistake by a legal adviser in his interpretation of the relevant rule is not a sufficient ground for granting special leave to appeal out of time. Indeed in the celebrated case of *Re Coles and Ravenshear* itself the Court of Appeal had held that a mistake of counsel as to the effect of the relevant rule was not a sufficient ground for granting special leave to appeal out of time. This case was decided before the law on this point was changed in England (see *Gatti* v. *Shoosmith*[2]). The law here in Malaysia as was pointed out by Suffian F.J. (as he then was) in the case of *Chong Kueng Ying & Ors.* v. *Lovis Lavagna*[3] is the same as the previous English Law — the mistake of a legal adviser is not a sufficient ground for granting special leave. Similarly in *Chin Hua Sawmill Co. Sdn. Bhd.* v. *Tuan Yusoff bin Tuan Mohamed*[4] it was held that the failure to serve a notice of appeal on the respondent within the prescribed period owing to a mistake of a solicitor was not a ground for granting special leave.

It may be noted here that whereas under rule 13 of the Federal Court (Civil Appeals) (Transitional) Rules. 1963 special leave of the Federal Court is required in order to bring an appeal after the expiration

of the prescribed period the rules relating to civil appeals from the subordinate courts to the High Court do not require special leave to file a notice of appeal out of time or to file and serve a memorandum of appeal and the appeal record out of time. The High Court has an absolute and unfettered discretion to allow or refuse an extension. Nevertheless such an application will not succeed on flimsy grounds. In the case of a memorandum of appeal Order 59 rule 3(3) of the Rules of the Supreme Court specifically states that an appeal may be dismissed if the memorandum of appeal is not filed or is not served within the prescribed time and no sufficient ground is shown for the delay. Some good ground must be shown although in a proper case an extension may be allowed even if the delay is occasioned by a legal adviser who misreads the relevant rules relating to appeals to the High Court. These rules however are so clear that they can hardly invite any misconstruction in their scope and application and therefore their misinterpretation by an advocate and solicitor as a ground for seeking an extension of time will not be readily accepted.

In the present application before me the appellant's counsel did not say that he had made a mistake in his interpretation of the rules but his affidavit does indicate that he either failed to appreciate the implications of the relevant rules or he simply thought them to be unimportant. Mr. Devadason's affidavit showed no sufficient ground for the delay in serving the memorandum of appeal and the appeal record on the respondent. To say that the appellant had a good chance of succeeding in the appeal on its merit was not a sufficient ground by itself. The appellant had to show some other circumstance of a kind which the court could accept as a reasonable excuse for not serving the memorandum of appeal and the appeal record within the prescribed period. I was not prepared to accept any mistake or neglect on the part of Mr. Devadason to appreciate the clear and unambiguous rules of procedure as a ground for not serving the memorandum of appeal and the appeal record on the respondent within the prescribed period.

With respect, I must say that Mr. Devadason should have exercised a little more care in ensuring that the procedural rules were strictly complied with as he was acting for the appellant throughout the proceedings and all documents had been served upon him. Regretfully however the rules of procedure relating to civil appeals from the subordinate courts to the High Court were utterly disregarded. First of all the memorandum of appeal was filed prematurely in the High Court on May 10, 1978. The memorandum was required to be filed not at any time before but within fourteen days after service of Form 40 on May 17, 1978. In a sense therefore no memorandum of appeal was properly filed in the High Court — the one filed on May 10, 1978 served no purpose as it was not filed pursuant to any rule of procedure. Secondly the memorandum of appeal and the record of appeal which should have been served on the respondent on or before May 31, 1978 were not served until June 19, 1978. Mr. Devadason's excuse for this delay cannot be accepted. He said he could not serve the memorandum of appeal and the appeal record within time because he had not received back the appeal record with the inclusion of appellant's bundle of documents until June 12, 1978. Even if he thought that he had a good reason for not serving the appeal record in time Mr. Devadason certainly had no excuse for not serving the memorandum of appeal on the respondent within the prescribed period. Thirdly it was quite wrong on the part of counsel to have returned the appeal record to the Registrar of the Sessions Court for the purpose of including the appellant's bundle of documents. This bundle should not have formed part of the record at all. The bundle was dated April 4, 1978 but the Sessions Court file shows that it was filed on April 15, 1978 so that when the final order of the Sessions Court was made on April 7, 1978 this bundle was not before the court and was therefore not considered by the learned President nor did the respondent have an opportunity to agree or disagree with it. Lastly there was a failure to comply with Order XXXIX rule 2(6) of the Subordinate Courts Rules because the notice of appeal was not served on the substituted defendant Haji Alwi bin Abdullah. This rule required the appellant to serve the notice of appeal on all parties directly affected by the appeal and it cannot be denied that the substituted defendant was very much affected by the appeal and he ought to have been served with the notice of appeal. This defect was eventually rectified. Mr. Devadason relented from his earlier stand and had the whole appeal record which included the notice of appeal served on the substituted defendant a few days before the appellant's application for extension of time came up for hearing.

After hearing the parties I came to the conclusion that the appellant had failed to show sufficient ground for not serving the memorandum of appeal and the appeal record on the respondent within the prescribed period. I was not prepared to exercise my discretion in favour of granting the application and I accordingly dismissed it as well as the appeal itself with costs.

From the above judgment the appellant appealed to the Federal Court.

FEDERAL COURT.

D.A. Devadason for the appellant.

N. Ramachandran for the respondent.

Thara Singh Sidhu for substituted defendant, Haji Alwi bin Abdullah.

Cur. Adv. Vult.

Wan Suleiman F.J. (delivering the judgment of the Court): This is an appeal against refusal by the High Court Malacca to grant an application for extension of time in which to serve a memorandum of appeal on the respondent in an appeal thereto from the decision of the Sessions Court.

The facts leading to the application in the court below are sufficiently set out in the grounds of the learned judge, so that it will be superfluous for us to set it out here.

Mr. D.A. Devadason, counsel for the applicant in his affidavit supporting the motion stated that he received Form 40 from the Registrar of the Sessions

Court on May 17, 1978 wherein a request to pay a sum of $48.50 was made. This sum was paid to the Registrar on the same day. On May 18, 1978 he returned the appeal record to the Registrar because the appellant's bundle of documents dated April 4, 1978 had not been included in the appeal record. On June 12, 1978 the appeal record was completed whereupon a further sum of $29 was paid to the Registrar and on June 17, 1978 a copy of the memorandum of appeal and appeal record were posted to the respondent and these were received by the respondent on June 19, 1978. Mr. Devadason stated further in his affidavit that the appellant had a good chance of succeeding in the appeal on the merits of the case. He said that as the appeal record was ready only on June 12, 1978 the date on Form 40 should read June 12, 1978 and not May 17, 1978. He said that in the peculiar circumstances of the case an extension of time should be granted in terms of the notice of motion.

Order 59 rule 4(3) reads as follows: —

"If the memorandum of appeal is not filed or is not served within the prescribed time and no sufficient ground is shown for the delay the appeal may be dismissed."

The learned judge held that Mr. Devadason's affidavit showed no sufficient ground for the delay in serving the memorandum of appeal and the appeal record on the respondent. He found, and with respect we agree that many rules relating to civil appeals from subordinate courts to the High Court had been disregarded.

That part of his Lordship's judgment is set out in extenso:

"First of all the memorandum of appeal was filed prematurely in the High Court on May 10, 1978. The memorandum was required to be filed not before but within fourteen days after service of Form 40 on May 17, 1978. In a sense therefore no memorandum of appeal was properly filed in the High Court — the one filed on May 10, 1978 served no purpose as it was not filed pursuant to any rule of procedure. Secondly the memorandum of appeal and the record of appeal which should have been served on the respondent on or before May 31, 1978 were not served until June 19, 1978. Mr. Devadason's excuse for this delay cannot be accepted. He said he could not serve the memorandum of appeal and the appeal record within time because he had not received back the appeal record with the inclusion of appellant's bundle of documents until June 12, 1978. Even if he thought that he had a good reason for not serving the appeal record in time Mr. Devadason certainly had no excuse for not serving the memorandum of appeal on the respondent within the prescribed period. Thirdly it was quite wrong on the part of counsel to have returned the appeal record to the Registrar of the Sessions Court for the purpose of including the appellant's bundle of documents. This bundle should not have formed part of the record at all. The bundle was dated April 4, 1978 but the Sessions Court file shows that it was filed on April 15, 1978 so that when the final order of the Sessions Court was made on April 7, 1978 this bundle was not before the Court and was therefore not considered by the learned President nor did the respondent have an opportunity to agree or disagree with it. Lastly there was a failure to comply with Order XXXIX rule 2(6) of the Subordinate Courts Rules because the notice of appeal was not served on the substituted defendant Haji Alwi bin Abdullah. This rule required the appellant to serve the notice of appeal on all parties directly affected by the appeal and it cannot be denied that the substituted defendant was very much affected by the appeal and he ought to have been served with the notice of appeal. This defect was eventually rectified. Mr. Devadason relented from his earlier stand and had the whole appeal record which included the notice of appeal served on the substituted defendant a few days before the appellant's application for extension of time came up for hearing."

The decision as to what constitutes sufficient ground for the delay necessarily involves the exercise of judicial discretion. In this court, on an application for special leave to appeal out of time, the mistake of a legal adviser has been held to be not a sufficient ground for granting special leave (see *Chong Kueng Ying & Ors.* v. *Lovis Lavagna*[3]). Similarly it was held in *Chin Hua Sawmill Co. Sdn. Bhd.* v. *Tuan Yusoff bin Tuan Mohamed*[4] that the failure to serve a notice of appeal on the respondent within the prescribed period owing to a mistake of a solicitor was not a ground for granting special leave.

What Thomson C.J. said of judicial discretion in *Veerasingam* v. *Public Prosecutor,*[5] though that was a criminal reference, applies with equal force to matters of civil procedure, and we quote: —

"Clearly, to exercise his discretion properly the judge must apply his mind to all the relevant material. He must consider the circumstances of the original trial. He must consider the original Petition of Appeal. And he must consider the circumstances which are now urged upon him to induce him to allow any departure from or addition to that original Petition of Appeal. He must consider his own powers as to such matters as the granting of adjournment and the requiring of Notice to be given. And then he must exercise his discretion as he sees fit in order that substantial justice may be done in the matter. It may be that he may find it helpful to look at what has been done in some other case by some other judge but if he does he must be careful to look at what that other judge has done merely as an illustration and not as laying down any judicial precedent."

With respect we agree with the learned judge that no sufficient ground has been advanced for the delay as to incline him to exercise his discretion in favour of the appellant.

The appeal is accordingly dismissed with costs.

Appeal dismissed.

Solicitors: *D.A. Devadason; N. Ramachandran & Co.; Goh Soot Hwang & Co.*

JOHARA BI BINTE ABDUL KADIR MARICAN v. LAWRENCE LAM KWOK FOU & ANOR.

[F.C. (Lee Hun Hoe C.J. (Borneo), Chang Min Tat & Syed Othman F.JJ.) September 10 & October 13, 1980]
[Kuching — Federal Court Civil Appeal No. 50 of 1980]

Evidence — Payment of balance of purchase price for land sold — Whether paid to vendor's husband — Inference from facts — Burden of proof — Whether burden shifted.

Contract — Sale of land — Payment of balance of purchase price — Burden of proof.

In this case the appellant claimed the sum of $135,000 the balance of the purchase price of the appellant's property which she had sold. The 1st respondent said that he had paid the money to the appellant's husband, who acted as agent for her. The appellant's husband denied receiving the money. The learned trial judge was not impressed with the evidence of the 1st respondent who was a bank manager, but he held that it was all a matter of proof, that the appellant had not proved her case and therefore the burden had not passed to the respondents to disprove it. He held that the evidence of the appellant's husband had erased whatever preponderance there was in the appellant's favour, in the result that the evidence on both sides became evenly balanced and that a satisfactory conclusion could not be arrived at. The appellant appealed.